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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. HOWARD WEBBER, Defendant.	No. CR 13-662 RS **UNITED STATES' SENTENCING MEMORANDUM** **Date: May 23, 2017** **Time: 2:30 PM** **Place: Courtroom #3, 17th Floor**

For the reasons set forth below, the United States requests that the Court sentence the Defendant, Howard Webber ('Webber"), to a term of 147 months' imprisonment (which equates to the middle of the United States Sentencing Guidelines range given a total offense level of 26 and criminal history category of V plus twenty-four months for aggravated identity theft), [1] a three-year term of supervised

[1] By statute, in determining the term of imprisonment to be imposed on Webber for mail fraud, the court "shall not in any way reduce the term to be imposed . . . so as to compensate, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for [Webber's] violation[s] of [18 U.S.C. §1028A]." 18 U.S.C. § 1028A(b)(3).

release, restitution in the amount of $541,267.07, pursuant to the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, and a $1,500 special assessment. A 147-month sentence is sufficient, but not greater than necessary, to achieve both Guidelines and statutory sentencing goals. Such a sentence is just punishment for Webber's conviction on multiple counts of mail fraud and aggravated identity theft, as well as one count of conspiring to commit mail and wire fraud, and gives appropriate consideration to the defendant's role in devising and implementing a vast scheme to file hundreds of false tax returns, which cost the public treasury hundreds of thousands of dollars in fraudulent tax refunds, as well as the defendant's lengthy criminal history, repeated fraudulent conduct, and other characteristics.

I. Charges and Conviction

On September 6, 2016, a grand jury sitting in the Northern District of California returned a twenty-eight count superseding indictment against Webber and his co-conspirator, Clifford Bercovich ("Bercovich"). Webber was charged with one count of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. § 1349, nine counts of mail fraud, in violation of 18 U.S.C. § 1341, and five counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A.

Webber's trial commenced on January 10, 2017. On January 24, 2017, the jury found Webber guilty on all counts.

At trial, the government showed that between June 2010 and January 2012, Webber conceived and implemented a scheme to solicit the personally identifiable information ("PII") of others, including inmates, drug addicts, and the homeless, and to use this information to file false tax returns claiming fraudulent tax credits, such as the Earned Income Credit. The evidence established that between June 2010 and January 2012, Webber and Bercovich filed over 900 false returns and received over $600,000 in fraudulent refunds from the IRS. *See* Trial Exhibit 313, Clip 43 (Webber estimates he and Bercovich have filed at least 900 returns).

In 2010, while an inmate at San Quentin State Prison, Webber came up with the idea of engaging in Earned Income Credit fraud. Specifically, Webber began devising a scheme to file tax returns in the names of others that falsely reported approximately $7,000 in income and claimed fraudulent tax credits in order to obtain tax refunds. At the time, Webber had joined up with Bercovich and founded Inmate

Assets Recovery and Liquidation Services, LLC (hereinafter "IARLS"), an entity the two had set up with the vague purpose of providing services to inmates. However, Webber and Bercovich had failed to make any money with IARLS. The company was, in essence, a shell with only a post office box–PO Box 603 in Kentfield, California–to its name. However, Webber realized that IARLS could be the perfect vehicle to give his Earned Income Credit fraud scheme a veneer of legitimacy.

In order for the scheme to work, Webber needed to gather the PII–including names and social security numbers–of as many individuals as he could. Bercovich could then use this PII to prepare and file false returns claiming fraudulent refunds. Rather than reporting a taxpayer's actual income, the return would report wages of approximately $7,000. Webber chose this "golden number" because it maximized the Earned Income Credit. The returns would direct the IRS to mail refund checks directly to IARLS's post office Box or to deposit them into IARLS's bank accounts.

When Webber was released from San Quentin, in Fall 2012, he and Bercovich immediately started working on information forms they could use to collect PII, as well as flyers promoting the scheme. Shortly thereafter, Webber signed up the first victims and, with the help of Mayra Parl, Webber's ex-wife and a tax preparer, Bercovich and Webber filed the first false returns.

Soon, Webber convinced others to recruit more victims on his behalf. Webber would offer to pay recruiters for every completed information form they brought in. He also provided them with IARLS information forms with which to collect PII and taught them how to pitch the program to potential victims. The pitch was in constant flux. Sometimes he would explain that IARLS could help people take advantage of a secret loophole. Other times the aim of the program was to help people claim governmental assistance in the form of a stimulus package or assistance for the indigent, or even the incarcerated. One thing remained constant however: the recruiters were to get victims' PII, including their social security numbers. With the help of these first recruiters–including Mark Bode, Tim Gomes, Jason Demello, and Ray Walbert–Webber began building a network that would allow him to collect the PII of hundreds of individuals and file over 900 false tax returns.

Not only was Webber responsible for building the scheme's network of recruiters, he controlled all aspects of the scheme's organization and functioning. Webber determined what share of the refunds he and Bercovich would keep and how much would go to recruiters and victims in whose names the returns were filed. He also reviewed and edited all of the scheme's promotional materials and kept close tabs on all the tax returns filed, as well as on the scheme's finances. *E.g.*, Government's Trial Exhibit 972 (E-mail from Webber to Bercovich approving final draft of promotional material); Government's Trial Exhibit 63 (Webber line-edits to promotional materials); Government's Trial Exhibit 984 (E-mail from Bercovich to Webber attaching spreadsheets detailing returns prepared by IARLS). It was at his request that Bercovich opened IARLS's bank accounts, and it was on his instructions that Bercovich disbursed the funds coming into that account.

In July 2011, Webber was incarcerated at Santa Clara County Jail, where he had access to a new pool of potential victims and recruiters: his fellow inmates. Webber actively promoted the scheme while at Santa Clara, gathering PII from fellow inmates and bringing on others, including Jose Luis Garcia, as recruiters. Government's Exhibit 312, Clip 41 ("[Webber:] So, Cliff, I want you to check [Jose] Luis Garcia for me. . . . He is very important to me."). By the time Webber left Santa Clara in September 2011, he had created a recruiting infrastructure that generated a constant flow of PII well after his release. Government's Trial Exhibit 310, Clip 38 ("[Webber:] Right, right, but the flow of referrals [from Santa Clara]? [Bercovich:] Oh, yeah. I've got plenty of referrals. [Webber:] Isn't that amazing?").

After his release from Santa Clara, Webber was transferred to the Milwaukee Secured Detention Facility ("MSDF"), where the scheme metastasized. At MSDF, Webber quickly built up yet another network of recruiters, including Patick Bruening, Jermaine Terrell, and Norvell Colemon. At MSDF, the scheme caught on so quickly that soon Webber was asking Bercovich to send hundreds of blank information forms by overnight mail so that Webber and his recruiters could collect PII from other inmates. Government's Trial Exhibit 303, Clip 27 ("[Webber:] Send me three packages of a hundred. . . . Three packages of a hundred next day."). In fact things were going so well that Webber discussed with Bercovich his plans for expanding the scheme by hiring more recruiters and targeting other vulnerable groups, including homeless populations from Minnesota to Texas.

Despite being in custody, Webber remained in control of the scheme through regular and frequent phone conversations with Bercovich. Through these phone calls, Webber kept track of the referrals mailed to IARLS, the false tax returns filed by Bercovich on behalf of IARLS, and the refund payments from the IRS. *E.g.*, Government's Trial Exhibit 293, Clip 9 ("[Webber:]You sent Lee his file right?"); Government's Trial Exhibit 302, Clip 29 ("[Webber:]Files are paying and eveything's cool?"); Government's Trial Exhibit 310, Clip 37 ("[Webber:] [D]id anybody else's file come in from [MSDF]?"). Webber also instructed Bercovich on how to overcome logistical hurdles and how to increase their profits. *E.g.*, Government's Trial Exhibit 289, Clip 1 ("[Webber:] we have to incorporate that check cashing fee because we are spending too much time running around and f[]ing around. We, we are killing probably six hours a day of our professional time."); Government's Trial Exhibit 296, Clip 16 ("[Webber:] We're just in our first year, Cliff. . . . [w]e're gonna figure out a way to subcontract more and [w]e can raise our fees to three hundred after January."). Webber directed Bercovich to make payments out of his share of the proceeds from the scheme. *E.g.*, Government's Trial Exhibit 296, Clip 15 ("I want to send [Mayra Parl] a thousand dollars right now out of my money."). At trial, the government traced over $40,000 in payments from IARLS's accounts to Webber's inmate account, as well as to his ex-wife, his attorney, and several friends.

Eventually, however, MSDF began investigating Webber's dealings and soon, together with federal law enforcement, brought an end to the scheme. By then, however, Webber had built a vast network of recruiters. In the course of this two-year scheme, IARLS filed over 900 false tax returns and received over $600,000 in fraudulent tax refunds from the IRS.

II. United States Sentencing Guidelines

Trial courts, "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *United States v. Booker*, 543 U.S. 220, 267 (2005); *see also Gall v. United States*, 552 U.S. 38, 51 (2007) (stating that the failure to calculate, or improperly calculating, the Guidelines range constitutes a procedural error at sentencing). In the instant case, it is both the Probation Office's and the United States' position that Webber's total offense level is a 26 and is in criminal history category V. This corresponds to an advisory Guidelines sentencing range of 110 to 137 months' incarceration. In addition, in light of his convictions for aggravated identity theft, pursuant to 18 U.S.C. § 1028A, Webber's advisory Guidelines range is increased by 24 months, yielding a total of 134 to 161 months' incarceration.

Even as modified by *Booker*, 543 U.S. 220 (2005), the Sentencing Reform Act continues to direct that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in the Sentencing Reform Act. 18 U.S.C. § 3553(a). In so doing, the Court "shall consider," among other things: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established by the Guidelines; (5) any pertinent policy statement; and (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *See id*. In this case, these factors support a Guidelines sentence of 147 months' incarceration followed by a three-year period of supervised release.

A sentence of 147 months is sufficient, but not greater than necessary, and accounts for (1) the seriousness of the offense; (2) Webber's leading role in this large scheme; (3) Webber's long and varied criminal history; (4) the need for adequate deterrence; and (5) the need to avoid sentencing disparities. The most critical factors here are specific and general deterrence. Webber, and any would-be defendant, should be forced to decide whether they would forfeit freedom for greed in carrying out any similar scheme to steal identities and defraud the national treasury out of hundreds of thousands of dollars. *See* U.S.S.G. § 2T1.1, introductory commentary ("Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines.").

In determining Defendant's base offense level and specific offense characteristics, the Court should take into account "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," as well as "all reasonably foreseeable acts and omissions of [Bercovich] in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3. Further, the Court may receive and consider any "information concerning the background, character and conduct of [Webber] . . . for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661; *see also* U.S.S.G.

§ 1B1.4; *United States v. Luv*, 439 Fed. Appx. 674 (9th Cir. 2011).

A. Tax Loss Calculation

Under the Guidelines, the primary factor in determining the offense level for a tax crime is the tax loss. The tax loss for a case involving false or fraudulent tax returns is "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." U.S.S.G. §2T1.1(c)(1). The tax loss here is $610,089.69.

As established by the evidence at trial, the basis of Webber's scheme was to use tax returns to defraud the federal treasury. IARLS was never in the business of preparing legitimate tax returns or even attempting to do so. At no point in time did Webber or Bercovich or anyone at IARLS attempt to determine the actual income of any of IARLS's victims. In fact, sometimes Webber did not even tell his victims he would be preparing a tax return in their name. The only information IARLS needed from its victims was their PII. Using this PII, IARLS could file an income tax return claiming a false income figure–approximately $7,000 so as to maximize the Earned Income Credit–and claim fraudulent refunds. Further, in some cases, Bercovich and Webber kept these fraudulent refunds for themselves.

The Ninth Circuit has explained that in such a scheme, the tax loss is equal to the total amount claimed on the fraudulent returns. *United States v. Stargell*, 738 F.3d 1018, 1025 and 1026 n.3 (holding that the tax loss included the "total refund amount claimed on all of the fraudulent returns"); *see also United States v. Riley*, 143 F.3d 1289, 1292 (holding that tax loss was simply "the amount set forth on the face of the claims for refund"). Here, the evidence presented at trial established that IARLS filed over 900 tax returns[2] and received $610,089.69 in tax refunds from 711 tax returns. As established by the trial evidence, these refunds were all fraudulent. They are the result of false tax returns filed using the PII of IARLS's victims and false income figures made up by Webber and Bercovich. Further, they were deposited into bank accounts opened in the name of IARLS–a company which Webber admitted he created. These $610,089.69 are all the proceeds of the charged scheme and are all part of "the total amount of loss that was the object of the offense." Accordingly, these tax refund checks deposited into IARLS's bank accounts support a tax loss figure of $610,089.69.

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[2] "[Webber:] Well, you know I, I've never been told how many files came into the office this year. And, I just realized I got some information on how many files must have come through. There must have been at least nine hundred files because on Mayra's system she can only take two hundred and fifty files. She said she went over two hundred and fifty files by sixty five files, and she had to pay like, five ninety seven extra on it, which would have been some like, three hundred and some files. Well that would have represented only the one year we can transfer. If you times that by three, that's nine hundred files. If nine hundred files were processed, take twenty percent off the top that didn't pay, and if you cut that in half, that's still forty thousand bucks. And, um, you know, I'm a little, got myself pretty upset over it thinking how, uh, all the number don't jive, seem to jive right now." Government's Trial Exhibit 313, Clip 43.

In the alternative, tax returns filed with the IRS support a tax loss figure of $551,229. At trial, the government introduced 608 tax returns filed with the IRS as part of the scheme. These false returns claim $484,459 in fraudulent refunds. Exhibit A. In addition to Bercovich's testimony at trial about the fraudulent nature of these returns, their falsity is also obvious from the face of these returns. All bear the hallmarks of Webber's scheme. They all report income between $6,000 and $7,254. None report any withholdings or attach any Forms W-2. All claim the same set of fraudulent deductions: the Earned Income Credit, the Making Work Pay Credit,[3] and the Recovery Rebate Credit.[4] And all list the same address as the taxpayer address: IARLS' PO Box 603 in Kentfield, California.[5] P.O Box 603 had only two authorized users: Webber and Bercovich.

In discovery, the government also provided the defense with an additional 86 returns that were also filed with the IRS as part of the scheme. These false returns claim an additional $66,840 in fraudulent refunds. Exhibit B; *see also* 18 U.S.C. § 3661; U.S.S.G. § 1B1.4; *United States v. Luv*, 439 Fed. Appx. 674. Like the 608 tax returns admitted at trial, these returns also bear all of the hallmarks of Webber's scheme. They all report income of between $6,000 and $7,500. None report any withholdings or attach any Forms W-2. All claim the same set of fraudulent deductions: the Earned Income Credit, the Making Work Pay Credit, and the Recovery Rebate Credit. And all list the same address as the taxpayer address: IARLS' PO Box 603 in Kentfield, California.[6] Together, these 694 returns independently

[3] The Making Work Pay Credit was available in 2009 and 2010 but not 2008.

[4] The Recovery Rebate Credit was available in 2008 but not 2009 or 2010.

[5] Two tax returns out of the 608 report a different address: Mark Bode's 2008 return (Government's Trial Exhibit No. 396) and his 2009 return (Government's Trial Exhibit No. 397). However, Mark Bode testified at trial as a defense witness and admitted to his involvement in the scheme. Further, the tax returns otherwise share all the characteristics of the false tax returns filed as part of the scheme.

[6] Two tax returns out of the 84 report a different address: Jessie Adams's 2008 return (Bates number 18793-18795) and his 2009 return (Bates Number 18797-18798). Both list PO Box 102 as the address, which appears to be a typo. However, the refund checks issued as a result of these returns were both deposited into IARLS's bank account. (Government's Trial Exhibit No. 274 at 1 and 2). Further, the tax returns otherwise share all the characteristics of the false tax returns filed as part of the scheme.

support a tax loss of $551,299.

Accordingly the total tax loss in this case is $610,089.69 or, in the alternative, $551,299. In either case, the tax loss equates to a base offense level of 20 pursuant to U.S.S.G. §2T4.1(i).

B. Aggravating Role

The United States agrees with the Presentence Investigation Report's ("PSR") conclusion that an enhancement for Webber's role in the offense is appropriate. Pursuant to U.S.S.G. § 3B1.1(a), a 4-level enhancement is appropriate where Webber "was an organizer or leader of a criminal activity that . . . was otherwise extensive . . . ."

By his own admission, it was Webber who came up with the idea to file false returns and figured out how to implement this idea to make money. He explained that he and Bercovich were "50/50 partners" in IARLS and that it was his role to "get the clients" and "maintain . . . [the] network." Government's Trial Exhibit 969. In one phone call presented at trial, Webber tells Bercovich he plans to expand IARLS by targeting individuals in homeless shelters. Government's Trial Exhibit No. 306, Clip 31. Webber also routinely directed Bercovich to make payments out of IARLS's bank account. Further, as Patrick Bruening, Jermaine Terrell, and Norvell Coleman all testified, and as letters mentioning Webber confirm, it was Webber who hired and trained IARLS's recruiters. *E.g.*, Government's Trial Exhibit 3 ("I kind of lost contact with Mr. Howard Webber. Can you let him know I wrote?"); Government's Trial Exhibit 45 ("This referral was made by Mr. Howard Webber."); Government's Trial Exhibit 84 at 5 ("Because Howard told me [for] each client I send [I would] get $75."); *id*. at 6 ("The other matter is concerning a 10% reward you offered for each client referred. To this date I sent eight people to you. In trusting Howard [Webber] I personally assured each of the clients referred that this matter would be dealt with honest[l]y."); *see also United States v. Santos*, 281 F. App'x 748, 749 (9th Cir. 2008) ("Factors to consider in determining whether the defendant qualifies for an "organizer" enhancement include the nature of his participation in the offense, the extent to which he participated in planning the offense, and whether he recruited accomplices."); *United States v.Guyton*, 36 F.3d 655, 662 (7th Cir. 1994) ("Organizing or enlisting others for the purpose of executing the crime can constitute sufficient control of another under § 3B1.1(a)."). It was also Webber who decided how much recruiters would be paid. E.g., Government's Trial Exhibit 302, Clip 24 ("[Webber:] Well we said one fifty, but send [Patrick Bruening] two fifty."). Accordingly, Webber undeniably exercised "some degree of control or organizational control over others," *United States v. Brown*, 771 F.3d 1149, 1159 (9th Cir. 2014), and was an "organizer or leader of a criminal activity."[7]

Further, this activity was "otherwise extensive." Here, the activity was extensive, first, in light of the substantial number of tax returns it filed and the significant loss of money it caused. *See United States v. Wynn*, 300 Fed. Appx. 544, 546 (9th Cir. 2008) (holding that a criminal activity was otherwise extensive because it involved a significant loss of money and a substantial number of fraudulent tax returns). IARLS filed over 900 fraudulent returns and it received over $600,000 in fraudulent refunds. Second, the activity was extensive in light of the number of participants, whether they were knowing participants or unwitting outsiders. *See* U.S.S.G. § 3B1.1(a), cmt. Application Note 3 ("In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive."). The enterprise had at least two knowing participants: Webber and Bercovich. Further, Mayra Parl also helped prepare and file false returns. The enterprise involved many recruiters who helped Webber sign up new participants. At trial, Patrick Bruening, Jermaine Terrell, and Norvell Coleman all testified that they were recruiters hired by Webber. In his testimony, Bercovich also mentioned a number of other IARLS recruiters, including Tim Gomes, Mark Bode, Jason De Mello, Joel Garcia, Joel Nixon, Cory Prentice, and Ray Walbert. There was also evidence of another recruiter by the name of Gerald Gatson. *E.g.*, Government's Trial Exhibits 92, 93. In addition to these recruiters, hundreds of individuals participated in the enterprise by providing their names and social security numbers to IARLS, which were then used to file false returns. Thus, Webber was clearly an "organizer or leader of a criminal activity that . . . was otherwise extensive." U.S.S.G. § 3B1.1(a).

C. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

The United States agrees with the PSR's conclusion that a 2-level enhancement is appropriate given Webber derived all his income through the promotion of an Earned Income Credit tax scheme.

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[7] It should be noted that the enhancement applies even if there is more than one organizer or leader. *See, e.g.*, *United States v. Bolden*, 596, F.3d 976, 984 (8th Cir. 2010).

U.S.S.G. § 2T1.4(b)(1) and Application Note 2. As established by the evidence at trial, IARLS was created and operated by two partners: Webber and Bercovich. And IARLS made its money, all its money, by filing false tax returns that fraudulently claimed tax credits including the Earned Income Credit. Webber's role in IARLS was specifically to promote the scheme by getting clients and maintaining IARLS's network. In particular, Webber was the one who pitched IARLS to victims and convinced them to provide him with their name and social security number. In one recording presented at trial, Webber explains IARLS has approximately 1,000 clients and has filed at least 900 tax returns. Government's Trial Exhibit 315, Clip 47 ("We easily, we must have easily hit a thousand clients in the last year."); Government's Trial Exhibit 313, Clip 43 ("There must have been at least nine hundred files."). In another, he describes his future plans to expand the scheme by promoting it in homeless shelters. Government's Trial Exhibit 306, Clip 31 ("[Webber:] Just so you know, Gatson's figured out there's like six thousand homeless people in downtown Milwaukee . . . . So this guy is gonna be a top . . . producer. (Laugh).") As the Guidelines explain, "[a]n increased offense level is specified for . . . those who make a business of promoting tax fraud because their conduct poses a greater risk of revenue loss and is more clearly willful." U.S.S.G. § 2T1.4(b)(1), cmt. Background. The record clearly establishes Webber's business was that of promoting tax fraud.

D. Total Offense Level

In light of (1) the tax loss of over $550,000, (2) Webber's role as an organizer or leader of a criminal activity that was otherwise extensive, and (3) the fact that Webber derived all of his income by promoting and implementing an Earned Income Credit tax scheme, the PSR correctly calculates Webber's total offense level under the Guidelines as 26.

E. Seriousness of the Offense

The conduct in this case is serious for several reasons. First, Webber *repeatedly* defrauded the national treasury. He realized that he could turn the identity of others into cash by filing fraudulent tax returns. He realized that if he submitted a false return, which fraudulently claimed refundable credits including the Earned Income Credit, he could defraud the IRS of approximately $800 each time. Second, Webber did not commit his crime alone. Instead, he recruited a partner, Bercovich, and built a large network of paid recruiters to obtain PII for him so that he could file false return after false return and claim fraudulent refunds with each and every return. Third, Webber stole the identities of others to perpetrate his scheme in an effort to avoid detection by the IRS. Fourth, Webber preyed on vulnerable populations, including the homeless, drug addicts, and inmates. Over the course of approximately two years, Webber filed over 900 tax returns and defrauded the public treasury of over $600,000.

F. General and Specific Deterrence - Respect for the law

The need for deterrence in tax cases is of great significance to the Internal Revenue Service. General deterrence is one of the prescribed goals of every sentencing, *United States v. Pugh*, 515 F.3d 1179,1194 (11th Cir. 2008), but it occupies an especially important role in sentencing for criminal tax offenses. The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. "Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators." U.S.S.G. Ch 2, pt. T, introductory cmt.

In that regard, a significant term of imprisonment should be imposed against Webber to deter others and to promote respect for the law. Stolen identity refund fraud schemes such as this one can be hard to uncover. It is not atypical for numerous IRS Revenue Officers, Revenue Agents, and Criminal Agents to spend hundreds or thousands of hours attempting to detect, investigate, and prosecute such schemes. A light sentence encourages would-be violators to take their chances by filing false tax returns and seeing if the IRS responds with a check. Such a scheme offers potentially high rewards and should therefore be punished with commensurate severity to discourage fraud.

Webber's conduct is made all the more harmful by the fact that it inspired copy-cats. As Sean Cowgill, one of Webber's own witnesses, testified, Webber's scheme caught on in the entire Bay Area. Others, such as Cowgill himself, figured out how Webber's scheme operated and replicated it. This domino effect highlights the need to deter not only Webber but all would-be fraudster, including those whom Webber inspired.

G. Avoidance of Sentencing Disparities

The best way to ensure that Webber's sentence is not disparate from those convicted of similar crimes is to sentence him within the Guidelines range.

H. Webber's History and Characteristics

a. Criminal History Category Calculations

The United States agrees with the criminal history calculation set forth in the PSR. The PSR appropriately counts as two separate convictions (1) Webber's conviction for threatening with intent to terrorize, stemming from his July 28, 2005 arrest and (2) his conviction for violating a court order to prevent domestic violence, battery, and threatening with intent to terrorize, stemming from his September 7, 2006 arrest. As the Sentencing Guidelines make clear, where, as here, sentences are imposed for offenses that were "separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)," those sentences "always are counted separately." U.S.S.G. § 4A1.2(a)(2). Further, here, the California Court of Appeal made clear that these two separate cases were consolidated for purposes of trial only. Exhibit C at 3. Webber received two separate sentences–one for each of these two separate convictions.

The PSR also appropriately takes into account Webber's October 30, 1991 conviction for delivering and/or manufacturing cocaine. The Sentencing Guidelines provide that a defendant receives three criminal history points for each sentence of imprisonment exceeding one year and one month that falls within the applicable time period. U.S.S.G. § 4A1.1. Such a sentence falls within the applicable time period if it "resulted in the defendant being incarcerated during any part of . . . the fifteen-year period [prior to the defendant's commencement of the instant offense]." *Id.* § 4A1.2(2)(1).

Here, Webber received a six-year sentence on October 30, 1991 based on three counts of delivering and/or manufacturing cocaine. On the first count, he was sentenced to three years of incarceration, which was stayed. On the second count, he was sentenced to a consecutive sentence of three years of incarceration, which was also stayed. Finally, on the third count, he was sentenced to a concurrent sentence of two years of incarceration, which was also stayed. Webber was also sentenced to a six-year term of probation. In 1998, Webber's probation was revoked and he was ordered to serve his six-year "indeterminate sentence." Exhibit D ¶ 3. For purposes of calculating criminal history points, "the length of a sentence of imprisonment is the stated maximum (*e.g.*, . . . in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years . . .). That is, criminal history points are based on the sentence pronounced, not the length of time actually served." U.S.S.G. § 4A1.2, cmt. 2; *see United States v. Skannal*, 164 Fed. Appx. 565 (9th Cir. 2006) ("The Sentencing Guidelines are clear that the stated maximum of an indeterminate sentence controls . . . ."). Accordingly, it is clear that, for purposes of calculating Webber's criminal history, Webber received a six-year sentence.

Further, Webber served part of this sentence within the fifteen years prior to June 2010. In 1998, Webber's probation was revoked and he was ordered to serve his term of incarceration. However, Webber decided instead to flee to Panama. Exhibit D ¶ 4. He was eventually extradited to Wisconsin from California in 2011. On August 14, 2012, the Circuit Court for Waukesha County, Wisconsin found Webber had been incarcerated at various times between November 2, 1991 and December 1, 2009, and accordingly would receive credit for 641 days. In addition, the court specified, he would receive credit for his incarceration from July 20, 2011 onward. Exhibit D ¶ 2. At the time of the order, Webber remained incarcerated. Accordingly, it is clear that Webber served part of his sentence within the fifteen years prior to the instant offense–and even after the commencement of the instant offense. The PSR therefore properly counts Webber's October 30, 1991 conviction for delivering and/or manufacturing cocaine.

The PSR also appropriately accounts for the fact that the instant offense was committed while Webber was under a criminal justice sentence. U.S.S.G. § 4A1.1 (d). In fact, Webber was under two different sentences during the instant offense: one in Marin County, California for threatening with intent to terrorize (docket no. SC142902A), from which he was discharged on October 24, 2012; and one in Waukesha County, Wisconsin for delivering and/or manufacturing cocaine (docket no. 1990CF000594), from which he was discharged on October 9, 2015. Webber does not appear to contest the PSR in this regard.

b. General comments

Webber has a lengthy and varied criminal history that reveals a long-standing contempt for the law. Webber's criminal history goes back three decades and includes convictions for battery and threats, several counts of theft, drug convictions, and convictions for violating court orders. Webber's crimes have caused injury to domestic partners, business partners, and the public.

In addition, Webber has repeatedly shown his willingness to defraud others. In 2008, immediately prior to the offense at issue in this case, Webber solicited Bercovich, to assist him in perpetrating loan fraud. Specifically, on July 31, 2008, Bercovich prepared and Webber signed a false uniform residential loan application for a mortgage loan in the amount of $855,000 for a property located at 375 Redwood, Corte Madera, California 94925. On this application, Webber falsely reported he had total assets of $3,465,000 and a net worth of $2,745,000. Exhibit E at 3. Further, in a financial statement he attached to the application he reported total assets of $10,775,000 and a net worth of $4,576,000. Exhibit E at 12.

Then, while on pre-trial release in this very case, in March 2015, Webber engaged in yet more fraudulent conduct. Webber obtained permission to travel to Watsonville, California, for what he described as a job interview at Sterling Pacific Financial, a financial services firm. Webber hired a chauffeured Lincoln Town Car and met with Joshua Fischer of Sterling Pacific Financial. Webber told Fischer he was interested in putting together two different real estate deals. Webber represented to Fischer he wanted to put together a bid for the Mount Madonna Inn, an out-of-business restaurant and bar, valued between $1 and 7 million. He also represented to Fischer he wanted to put together a deal to purchase 111 properties located in Alameda County. Webber then contacted John Holman of HomeVestors, a real estate investment firm, to invite him to invest in these two deals. In his email correspondence with Holman, Webber represented he was "using hard money to close this deal" and explained he had "an Asian Sales force who has cash buyers for the e/b/5 program" and "24 agents . . . ready to sell" these properties. Exhibit F at 1. In a brochure he forwarded to Holman regarding the Mount Madonna Inn project, Webber claimed he and other investors had already spent $3,045,000 on the project. Exhibit F at 6. In fact, according to the representations he made to the Court on January 22, 2015, Webber's only assets were his cash bond that he posted for bail and $10,000 he received from a liquor license deposit, which was in a trust administered by his attorney, Mr. Gravel.

This was not even the first time Webber lied about his involvement with the Mount Madonna Inn. In a letter to the Wisconsin Parole Commission dated November 21, 2011, Webber falsely represented that he had purchased the inn on December 23, 2009. Exhibit G at 2. However, at no point in time did Webber have any claim to the inn.

Webber's criminal history and repeated fraud schemes make clear that Webber is a danger to the public. A 147-month term of incarceration, in the custody of the Bureau of Prisons ("BOP"), will protect the public from being further victimized by Webber's fraudulent schemes and other criminal activity. Further, this sentence will allow him to take advantage of educational and vocational opportunities offered by the BOP and deter him from returning to a life of crime upon release.

Restitution

The Court should order Webber to pay restitution to the IRS in the amount of $541,621.07. In this case, an award of restitution is mandatory. Under the Mandatory Victims Restitution Act ("MVRA"), a district court must order a defendant who has committed specified offenses, including "any offense committed by fraud or deceit," 18 U.S.C. § 3663A(c)(1)(A)(ii), to make restitution to the victim of the offense. *United States v. Anderson*, 741 F.3d 938, 951 (9th Cir. 2013). A "victim" is defined as "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663A(a)(2).

Webber was convicted of mail fraud and conspiracy to commit mail and wire fraud, which are included in the class of offenses for which restitution must be ordered. *See* 18 U.S.C. § 3663A(c)(1)(A)(ii); *United States v. Lo*, 839 F.3d 777, 787–88 (9th Cir. 2016); *United States v. Thomsen*, 830 F.3d 1049, 1065–66 (9th Cir. 2016) (mail fraud); *United States v. Booth*, 309 F.3d 566, 575–76 (9th Cir. 2002) (wire fraud). Further, the IRS was directly harmed by Defendant's criminal conduct. As a result of Webber's scheme, the IRS paid out $610,089.69 in tax refunds based on tax returns submitted by Webber and Bercovich as part of the scheme. As the trial evidence established, all of the tax returns filed by Webber were false and therefore the entirety of the $610,089.89 constitutes an actual loss to the IRS.[8]

Contrary to Webber's claim, this restitution amount should not depend on whether "the taxpayers at issue were . . . . entitled to the refunds they received." First, taxpayers did not receive these refunds. Rather, they were paid directly to IARLS. Second, as the Ninth Circuit explained in *United States v. Stargell*, 738 F.3d 1018, 1026 n.3, in order to obtain any refund to which they might have been entitled, taxpayers would have had to file a *non*-fraudulent return. Here, *all* the returns were fraudulent. *All* reported an income figure that Webber and Bercovich picked because it maximized the refund they could claim, not because it had any relationship to defendant's actual income. Accordingly, none of these returns–these false returns–would have entitled taxpayers to a refund. Finally, even if the Court were inclined to consider such potential refunds, "[i]t is not the government's or the district court's responsibility to establish that [the taxpayers named in the returns filed by Webber and Bercovich] were entitled to refunds if no entitled-refund information was offered by the defendant." *Id.* at 1025. In other words, it is the defendant's responsibility to show that the named taxpayers would have been entitled to a refund–a burden defendant has failed to meet. *See also* U.S.S.G. §2T1.1, cmt. 3 ("In addition, the court should account for any unclaimed credit . . . .that is needed to ensure a reasonable estimate of the tax loss, but *only to the extent that* . . . (c) the *defendant* presents information to support the credit . . . sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy."). Accordingly, Webber should be ordered to pay restitution to the IRS in the amount of $541,621.07.

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[8] As the PSR notes, this amount has been reduced in light of (1) Bercovich's relinquishment of his claim to $9,751,39 in proceeds from the fraud, which he sent to the Wisconsin Department of Corrections, which it, in turn, provided to the IRS; (2) $51,755.76 in fraudulent tax refund checks which the IRS seized from Bercovich's residence; and (3) $6,961.56 in fraudulent tax refunds deposited into IARLS's accounts at Wells Fargo, which were turned over to the IRS.

To assist the IRS in properly accounting for and applying restitution payments received from Webber, the Government respectfully requests that the Court include the following in the Judgment:

> The total amount of restitution the defendant shall make to the Internal Revenue Service is $541,621.07.
>
> The defendant shall include with his payments to the District Court, his name and social security number, the District Court's docket number assigned to the case, the tax years for which restitution has been ordered, and a request that this information be sent, along with payment(s), to the appropriate office of the Internal Revenue Service.
>
> The Clerk's Office shall send the defendant's restitution payment(s), along with the information provided by the defendant, to the Internal Revenue Service as the following address:
>
> IRS – RACS
> Attn: Mail Stop 6261, Restitution
> 333 W. Pershing Ave.
> Kansas City, MO 64108

IV. Conclusion

For the reasons set forth above, the United States of America recommends a mid-range Guidelines sentence of 147 months' incarceration, a three-year term of supervised release, restitution of $541,621.07, and a $1,500 special assessment.

Respectfully submitted this 16th day of May, 2017.

BRIAN J. STRETCH

United States Attorney

/s/ Arthur J. Ewenczyk

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